Quick Find Co. *and* Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 14-CA-15028

June 21, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On March 4, 1982, Administrative Law Judge Claude R. Wolfe issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent withheld vacation pay from Joseph Emily, Michael Rangel, and Charles Hoffman in violation of Section 8(a)(3) and (1). Respondent asserts that these three employees were not unlawfully denied vacation pay, but rather they failed to meet its attendance requirement entitling them to this benefit. We find merit in Respondent's position.

The facts, as more fully set forth in the Administrative Law Judge's Decision, are undisputed. Respondent had long-established rules governing eligibility for vacation and vacation pay. These rules required that an employee must have been employed for at least 1 year and have been in attendance on the job for at least 93 percent of the work year in order to qualify for a week's paid vacation. In 1981, in order to allay production disruptions created by staggered vacation schedules, Respondent lawfully promulgated a new policy requiring that vacations be taken during a designated week in June. In accordance with this policy, Respondent decided that the relevant work year for determining eligibility for a June 1981 vacation was from June 1980 through May 1981. Respondent contended that Emily, Rangel, and Hoffman failed to qualify for the June 1981 vacation pay because their attendance records for the relevant work year fell below the 93-percent requisite. However, the largest portion of their absences was attributable to a 7-week layoff during November and December 1980, which was the subject of an earlier unfair labor practice proceeding and was pending final determination by the Board at the time of the hearing in the instant case. Prior to the issuance of the Administrative Law Judge's Decision herein, the Board decided that the November-December 1980 layoff violated Section 8(a)(3) and (1).[1] Relying upon this finding, the Administrative Law Judge determined that Respondent could not rely on its earlier unfair labor practice to disqualify these otherwise entitled employees from their vacation pay. Accordingly, he concluded that Respondent's denial of vacation pay to these individuals constituted a separate violation of Section 8(a)(3) and (1).

In its exceptions Respondent argued that even if the additional hours lost through the unlawful layoff—280 hours—were fully credited toward these three employees' attendance records, none of them would have met the 93-percent requirement. We find support for Respondent's contention in the record evidence.

Examination of Respondent's attendance records for the time period here involved indicates that the number of hours Emily worked, adjusted for the unlawful layoff, comprised only 92.5 percent of the work year. Similarly, Rangel's adjusted attendance record shows a rate of only 89.3 percent and Hoffman's attendance totaled just 92.8 percent of the work year. Clearly, these employees would not have qualified for vacation pay irrespective of Respondent's discriminatory layoff. See *Elm Hill Meats of Owensboro, Inc., Elm Hill Meats, Inc., Baltz Brothers Packing Company*, 213 NLRB 874 (1974).

There is no evidence that Respondent did not apply its vacation policy uniformly or that employees were unaware of this widely known rule. Respondent was under no obligation to provide vacation pay to employees who did not meet the qualifications for such benefits. Accordingly, we reverse the Administrative Law Judge's determination that Respondent violated Section 8(a)(3) and (1) by withholding vacation pay from these employees and we dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

[1] See *Quick Find Co.*, 259 NLRB 1051 (1982).

DECISION

CLAUDE R. WOLFE, Administrative Law Judge: This case was heard before me in St. Louis, Missouri, pursuant to charges filed on June 2, 1981, and an amended

complaint issued August 21, 1981. The complaint alleges violations of Section 8(a)(3) and (1) of the Act consisting of the denial of vacation pay to Joseph Emily, Charles Hoffman, Bob Moore, Michael Rangel, and Brian Wadlow; a refusal to timely recall Eugene and Joseph Emily from layoff; the assignment of Eugene Emily to more onerous duties; and the discharge and refusal to reinstate Joseph Emily. Respondent denies the commission of unfair labor practices.

The parties filed post-hearing briefs which have been considered.

Upon the entire record[1] and my observation of the demeanor of the witnesses as they testified before me I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is engaged in the manufacture and sale of steel cabinets and related products. The complaint alleges, Respondent admits, and I find that Respondent meets the Board's jurisdictional standards and is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Board issued a Decision on January 13, 1982,[2] finding that Respondent laid off Michael Rangel, Joseph Emily, Charles Hoffman, Robert Moore, and Donald Dilschneider on November 6, 1980, in violation of Section 8(a)(3) and (1) of the Act, and committed several other violations of Section 8(a)(1) of the Act. The Board also adopted Administrative Law Judge Ries' finding that Eugene Emily was a statutory supervisory.

B. *Further Facts and Allegations*

Respondent laid off all its employees on May 28, 1981, including Eugene Emily, Joseph Emily, Charles Hoffman, Robert Moore, Michael Rangel, and Brian Wadlow. This layoff was neither alleged nor litigated as an unfair labor practice.

When then General Manager Nathan Fogel called the men together and advised them of the layoff, Eugene Emily,[3] a statutory supervisor, asked if the employees were going to receive vacation pay. Fogel, apparently after checking with owner Dwight Gold, told them vacation was supposed to start in June and there would therefore be no vacation until then. This was consistent with a notice to employees posted about May 1 notifying that all qualifying employees would get their vacation in June, but the laid-off employees did not in fact get their vacation in June or even by the date of the hearing before me.

The record fairly establishes that to qualify for a paid vacation an employee must be employed for 1 year and must have been present 93 percent of the scheduled workdays in the 12 months preceding the vacation.

Hoffman, Rangel, Wadlow, and Moore were recalled on July 10. Hoffman did not return. Eugene and Joseph Emily were recalled on July 15. On both July 10 and 15, new General Manager David Schuman explained that the payment of vacation pay depended on the outcome of the pending unfair labor practice case, which would result in them receiving vacation pay if the decision was in their favor or not receiving it if the decision was in favor of Respondent.

Of the five employees allegedly denied vacation pay for unlawful reasons, Brian Wadlow and Robert Moore had not been employed the requisite year in May 1981. Moore was subsequently discharged in July, prior to the completion of a year of employment. Wadlow would not have completed his first year until January 1982, after the hearing before me. Obviously, neither of them was entitled to any vacation in May or June 1981, and therefore they were denied nothing in the way of vacation pay.

Respondent asserts that Joseph Emily and Michael Rangel's ineligibility for vacation pay arose from the November 1980[4] layoff which caused their attendance to fall below the 93 percent required. Inasmuch as the Board has found the November to December 1980 layoff of Joseph Emily and Rangel to have been an unfair labor practice, it is patent that Respondent may not rely on it as a vacation pay tolling device. Accordingly, I find both were entitled to vacation pay in 1981 because they had met the qualifying requirements on May 28, 1981.

Charles Hoffman, who was also unlawfully laid off in November and December 1980, was not paid vacation pay, according to Schuman, because of this layoff but otherwise satisfied the 93-percent requirement. He was therefore eligible for vacation pay in June 1981 for the same reasons Joseph Emily and Rangel were. That Hoffman did not respond to a recall of July 10 does not, as Respondent's post-hearing brief suggests, obliterate his previously established entitlement to June vacation pay.

Summing up, Fogel was correct when he advised employees that vacation was not scheduled until June, but the real motivation for withholding vacation pay was set forth by Schuman. Hearing had been held on February 5 and 6, 1981, and the eligibility of Joseph Emily, Michael Rangel, and Charles Hoffman for vacation pay would only be established if the decision in that case found the November 1980 layoff to be unlawful. Respondent clearly had a right to litigate its liability for any wages lost as a result of the layoff and any consequential losses such as vacation pay, but Respondent must also bear the risks of such litigation. The Board has found the November 1980 layoff to be unlawful. It necessarily follows that Respondent was in fact wrong when it withheld the vacation pay of Joseph Emily, Rangel, and Hoffman. The

[1] Errors in the transcript have been noted and corrected.

[2] *Quick Find, Co.*, 259 NLRB 1051 (1982).

[3] I credit Emily's version of this conversation.

[4] Respondent's post-hearing brief inadvertently places the layoff in November 1981.

withholding was a consequence of its prior unfair labor practice and therefore also an unfair labor practice requiring a remedy. Accordingly, I find that the withholding of vacation pay to these three men violated Section 8(a)(3) and (1) of the Act and must be remedied.

1. The assignment of Eugene Emily

When Eugene Emily returned to work on July 15 he was advised that he had been demoted from foreman to production employee. He was assigned to work on the mig welder. Brian Wadlow, who had been doing that work, was transferred to spray painting to replace Hoffman. Wadlow and Eugene Emily were the most qualified employees at mig welding. Eugene Emily had in the past trained employees on this work. Eugene Emily considers mig welding to be the worst job in the shop. Joseph Emily, Eugene's brother, gave an opinion that it was the best job in the shop, noting the high pay for that work. Joseph Emily also ranked spray painting and mig welding as about the same in degree of difficulty and unpleasantness. Michael Rangel expressed an aversion to either mig welding or spray painting. Mig welding does involve the wearing of somewhat cumbersome protective clothing, and is a hot, smelly job because of the heat and unpleasant gaseous fumes generated by the welding. The assignment took place in the middle of summer and the temperature in the welding area reached as high as 100 degress Fahrenheit.

Prior to his demotion, Eugene Emily had spent about 70 percent of his working time operating a punch press. I am persuaded that this job and his set up and supervisory duties were probably more pleasant and would indeed appear to a reasonable man to be less taxing than mig welding. These former duties of Eugene Emily were split up among the other employees returning from layoff. The work force had dwindled from eight to six after the July recalls, and Rangel credibly testified the punch press work is now less than 8 hours every day.

The complaint alleges that Emily was assigned more onerous working duties on or about July 15, 1981, to discourage union activities. The General Counsel's argument reflects that this refers to Eugene Emily's assignment to mig welding other than some other production job.

The demotion of Eugene Emily was not alleged as unlawful, and Respondent was free to discharge him from his supervisory position. That it did not discharge him, as it had a right to do when it became dissatisfied with his supervisory performance[5] or even his union activity if that were the case, but retained him as the highest paid hourly employee, militates against a finding that it was determined to punish him because of his unprotected union activities. He was not laid off in November 1980 and was given a raise after his demotion, hardly indicators of any disposition to retaliate against him because he supported a union.

Emily had no vested "right" to retain the punch press work supplementary to his supervisory duties, or to a choice between spray painting and mig welding. It is not even clear that spray painting was a less onerous or more desirable job than mig welding. There is a division of opinion among the General Counsel's employee witnesses on this subject which suggests to me that neither ranks high in the eyes of the employees as a desirable position. The General Counsel has not shown that Respondent's purpose was to assign Emily to a job so oppressive that he would have no choice but to quit, or that mig welding was so onerous that anyone assigned to it would be compelled to leave. Eugene Emily did not quit and was still on the same job at time of hearing 4-1/2 months later. There is no evidence that Wadlow or anyone else assigned to mig welding before Eugene Emily had found it overly burdensome or had even complained about it, nor does it appear that the job was made any more difficult when Emily was assigned to it.

Spray painting was the only full-time production job other than mig welding to which Emily could have been assigned.[6] The credible evidence does not persuade me one is more onerous than the other. This being the case, the General Counsel cannot prevail and the question of whether Eugene Emily was discriminated against because he had engaged in unprotected union activity as a foreman does not arise.

2. Discharge of Joseph Emily

Joseph Emily was a most unbelievable witness whose demeanor was one of casual flippancy and conscious searching for testimony to bolster his cause. His testimony was liberally sprinkled with glaring internal inconsistencies, insouciant evasion, and obvious inherently improbable assertions. I do not credit him except on those occasions his testimony is otherwise corroborated, is probable in the circumstances, or amounts to admissions against his interest.

Joseph Emily injured his hand on the evening of July 21.[7] He did not seek medical treatment until about 8 a.m. on July 22 at the earliest, when he claims he set out on a 10-block 40- to 45-minute walk to the hospital. Putting aside the obvious question as to why a vigorous young man of 19 would take that long to walk 10 blocks, he did not arrive at the hospital by his calculation until 10:30 or 11 a.m. I do not believe he started out as early as he claims. The hospital treatment record shows he was seen by a doctor at 12:25 p.m. He was released from the hospital at 1:45 p.m. and concedes he was able to work.

Joseph Emily was admittedly aware of a company rule requiring employees to call in if they were going to be late or absent, and had called in on July 21, only the day before, to notify of a late arrival. He made no effort to call in or go to the plant on July 22. He explains that he had no phone nor money to make a call and did not call or go to work when discharged from the hospital be-

[5] I note that the evidence before Judge Ries caused him to suspect that Eugene Emily was refusing to perform supervisory functions which he had previously done, for which dereliction he was warned of possible discharge. *Quick Find Co., supra* at 1061.

[6] Punch press was and continued to be less than full-time work.

[7] He testified that a television set fell on his hand as he attempted to turn it on at 5:30 a.m. on July 22, but the hospital treatment record shows that he advised the hospital his injury occurred on the evening of July 21 when he dropped a heavy piece of furniture on his hand. He had no reason to mislead the hospital, and I am inclined to believe the July 22 date was invented by Joseph Emily to support his story of unexpected injury on that date.

cause his shift had ended. His shift did not in fact end until 2:30 p.m.,[8] and I cannot believe it would have been all that difficult for him to find a phone some time that day, to borrow the few cents needed for a pay phone from one or more of the assorted cousins he says he met on his way to the hospital, or have someone else call for him. A picture emerges of a young man with little concern for either the truth or his job.

Schuman had to call in job applicant Jeff Smith to replace Joseph Emily on July 22. At the end of the day, Schuman told Smith to return the next day because he did not know if Joseph Emily would return.

When Joseph Emily came to work on July 22 he presented the hospital release to Schuman and stated he had been at the hospital all day. Schuman noted the release time on the hospital form, told Emily he had not been all day at the hospital, and asked where he had been and why he had not called. Emily repeated he had been at the hospital all day and added he did not think about calling. Schuman then told Joseph Emily that according to company rules[9] he had voluntarily resigned by not calling in, there was no work for him, he should leave, and if he were needed the next day Schuman would call him. Joseph Emily left his brother's phone number as a place he could be reached. It would seem from these arrangements to call Emily and the advice to Smith to return on July 23 as a guard against the continued absence of Emily that Schuman had not made a final decision to terminate Joseph Emily on July 22 or at the end of their meeting on July 23.

After Emily's departure, Schuman checked with the hospital and was told Emily had been admitted at 12:30 p.m. on July 22. On July 24, Schuman called Joseph Emily and told him that the hospital advised he had been admitted at 12:30 p.m. and he had been discharged at 1:40 p.m.[10] Schuman then again asked why Emily could not have called or had some one else call. Emily again responded that he did not think of it and there was no one else to call for him. Schuman credibly asserts he called Emily because he was trying to get a better explanation of why Emily had not called, and was not trying to get rid of anyone. It is implicit in this testimony that he was giving Emily another chance to retain his job. Joseph Emily has not been recalled to work.

Although Schuman told Joseph Emily on July 23 that he had voluntarily quit pursuant to company rule, I conclude that Emily's final chance for retention expired on July 24 when he failed to give Schuman satisfactory explanation.

Respondent has utilized the voluntary quit rule in a discretionary manner. Other considerations determine how the rule is applied. As examples of the use of the rule, both Eugene Emily and Michael Rangel were late to work after their return from layoff and were told they had voluntarily quit but would be kept because of their good work record.

Schuman testified that he decided to terminate Joseph Emily because he and Nathan Fogel had previously had disciplinary problems with him, he was not a good worker, and had not called in on July 22. Schuman specifically refers to an incident on July 16 when Joseph Emily was called into Schuman's office, with Foreman Fritz present, and told Fritz had reported Emily for not staying by his job and getting his work done. Emily protested he was getting his work done and told Schuman to "keep Fritz off my ass so I could get some work done." Fritz spoke up and told Emily that next time he would say nothing but would clock Emily out and he would be fired. Schuman concurred. "That's right. One more chance and next time you're gone." Emily concedes this all happened and further concedes that he had applied foul names to Nathan Fogel when talking to other employees about Fogel.

The General Counsel contends that Respondent disparately applied the rule to Joseph Emily to terminate him because of his union activities. It is true that Joseph Emily did sign a union authorization card, but he engaged in no other significant union activity. His brother Eugene was both very active and known to be so by Respondent, but he was neither laid off in November 1980 nor have I found he was discriminated against in 1981. This certainly does not indicate an implacable resolve to root out and sever individual union adherents, notwithstanding that the Board has found the November 1980 layoff unlawful and the finding of that and various other unfair labor practices in the Board's decision heretofore cited establishes Respondent's hostility to employee union activities.

It is also true that Respondent has not enforced its rule against good workers to the extent of separating them, but I cannot on this record accord the status of "good" to Joseph Emily. The confrontation on July 16 would indicate his performance was less than that, and I have no basis upon which to substitute my judgment of his relative worth as an employee for that of Respondent. There is no showing that Respondent in any way conspired to get rid of Joseph Emily, or that his termination would have occurred but for his failure to call in during an entire day absence which I find was willful, following closely on the heels of his poor performance on July 16; and his failure to convincingly explain why he had not called in. Respondent adverts in its post-hearing brief to the fact that Joseph Emily "lied" to Schuman about his whereabouts on July 23, but Schuman does not specifically cite lies as a reason, although it could arguably be encompassed in the genus of failure to explain. Schuman obviously knew Emily was being untruthful on July 23 when he claimed a whole day at the hospital, but yet gave him an opportunity to explain on September 24.

Respondent's previous history of unfair labor practices does raise a suspicion regarding Joseph Emily's severance, but suspicion is not enough. The reasons advanced by Respondent are not inherently implausible or unsupported, nor has it been proved the rule was invoked

[8] Joseph Emily testified that he thinks his shift ended at 3:30 p.m., which makes his story all the more incredible.

[9] The rule reads, "Any employee not reporting for work by eight o'clock in morning, has voluntarily quit," but has been interpreted in view of different starting times to require a call in within one-half hour of the shift start. Another related rule reads, "No absence of work allowed without notification by 8 a.m."

[10] At first glance the time on the hospital form looks like 1:40 p.m.

against Joseph Emily on the basis of unlawful considerations.[11]

For the foregoing reasons I find that the General Counsel has not shown by a preponderance of the evidence either that Joseph Emily was terminated because of his union activities, or that Schuman's reasons for not permitting him to return to work are false.

Recall of the Emilys

The only issue remaining is whether the failure to recall Eugene and Joseph Emily on July 10, 1981, was unlawfully motivated.

The General Counsel argues that the union activities of the two, particularly Eugene, combined with Respondent's demonstrated union animus and the pretextual nature of the reasons advanced for not calling them until July 15, establish a violation of the Act.

Respondent relies on the testimony of David Schuman who testified he did not recall the Emilys on July 10 because he had appointed Fayron Fritz as a supervisor and wanted him to have an opportunity to relate to the other employees and show them the change in their jobs which had been "shuffled around," and wanted to give Fritz a chance to supervise without conflict with ex-Supervisor Eugene Emily and his brother Joseph who had demonstrated a poor attitude about management to other employees. Schuman also testified that Joseph Emily was a drawer welder, one of the final stages in production, and the first few days were needed to cut parts before going into production which meant there was no immediate need for Joseph Emily's services.

Schuman's explanation is not, as the General Counsel urges, patently unreasonable. Fritz had worked under Eugene Emily's supervision prior to the layoff, and it is understandable that some overt resentment from Eugene Emily over his demotion and Fritz' elevation might reasonably be predicted. This might well have caused Fritz some problems both in supervising Eugene Emily and establishing his authority with the other employees. With respect to Joseph Emily, the record establishes that he indeed was not particularly respectful of supervision, and was inclined to openly voice his antipathies, as witness his hereinabove noted derogatory references to Fogel and his subsequent insubordination toward Fritz on July 16. Schuman's assertion that there was no immediate work for Joseph Emily is unrebutted and credited.

Schuman's explanation seems reasonable, and I would also note that Respondent was under no obligation at all to recall Eugene Emily, a statutory supervisory at the time of the layoff. Inasmuch as Schuman's delay of the recall of Joseph and Eugene for 3 working days appears to be an exercise of managerial discretion, based on reasonable rather than pretextual or union considerations, I find and conclude that Respondent did not violate the Act by failing to recall the Emilys until July 15, 1981.

Conclusions of Law

1. Respondent Quick Find Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Teamsters Local Union No. 688, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. By withholding the vacation pay due Joseph Emily, Michael Rangel, and Charles Hoffman in June 1981, Respondent violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. Except as set forth above, Respondent has not violated the Act in any other respect alleged in the complaint.

The Remedy

In addition to the customary notice posting, I shall recommend Respondent be ordered to make Joseph Emily, Michael Rangel, and Charles Hoffman whole for the loss of vacation pay in June 1981 by paying them that vacation pay with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

[Recommended Order omitted from publication.]

[11] *P. G. Berland Paint City, Inc.*, 199 NLRB 927, 928 (1972); and see *Stoutco, Inc.*, 218 NLRB 645, 650–651 (1975).

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).